

ORIGINAL

(S E R V E D )  
( October 12, 1999 )  
(FEDERAL MARITIME COMMISSION)

**FEDERAL MARITIME COMMISSION**

**WASHINGTON, D. C.**

October 12, 1999

**DOCKET NO. 99-11**

**EXPEDITORS INTERNATIONAL OF WASHINGTON, INC.  
POSSIBLE VIOLATIONS OF SECTIONS 10(a)(1) AND 10(b)(1)  
OF THE SHIPPING ACT OF 1984**

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**SETTLEMENT APPROVED  
AND INVESTIGATION DISCONTINUED**

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Expeditors International of Washington, Inc. ("Respondent") and the Bureau of Enforcement ("BOE") submitted a joint memorandum in support of a proposed settlement of this proceeding. The parties believe that the proposed settlement meets the Federal Maritime Commission's ("Commission") criteria for approval of agreements resolving administrative enforcement claims and, therefore, should be approved.

### **Introduction**

By Order of Investigation dated July 21, 1999, the Commission commenced an investigation to determine whether Respondent had violated sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984 ("1984 Act").

Recognizing the potential costs of litigation and the inherent uncertainties attending resolution of disputed issues, and at the urging of the presiding Administrative Law Judge, the parties agreed to conduct settlement discussions. The settlement agreement which accompanies this ruling is the result of negotiations between counsel for Respondent and BOE. Based upon approval of the proposed settlement by the Presiding Judge and the Commission, the parties seek dismissal of Docket No. 99-11.

### **Authority for Settlement**

The Administrative Procedure Act ("APA"), 5 U.S.C. § 554(c)(1), requires agencies to give interested parties an opportunity, *inter alia*, to submit offers of settlement "when time, the nature of the proceeding, and the public interest permit." As the legislative history of the APA makes clear, Congress intended this particular provision to be read broadly so as to encourage the use of settlement in proceedings such as the present one:

. . . even where formal hearing and decision procedures are available to parties, the agencies and the parties are authorized to undertake the informal settlement of cases in whole or in part before undertaking the more formal hearing procedure. Even courts through pretrial proceedings dispose of much of their business in that fashion. There is much more reason to do so in the administrative process, for informal procedures constitute the vast bulk of administrative adjudication. . . . The statutory recognition of such informal methods should strengthen the administrative arm and

serve to advise private parties that they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations.

Senate Committee on the Judiciary, Administrative Procedure Act-Legislative History, S. Doc. No. 248, 79<sup>th</sup> Cong., 2d Sess. 24 (1946).

Courts have endorsed the use of the APA settlement provision “to eliminate the need for often costly and lengthy formal hearings in those cases where the parties are able to reach a result of their own which the appropriate agency finds compatible with the public interest.” *Pennsylvania Gas and Water v. Federal Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir. 1972).

The Commission itself has long recognized that the law strongly favors settlements:

. . . the law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts and it is thus advantageous to judicial administration, and, in turn, to government as a whole.

*Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 506,512 (1978), 18 S.R.R. 1085, 1092 (Initial Decision, 1978; administratively final November 29, 1978). See also *Del Monte Corp. v. Matson Navigation Co.*, 22F.M.C. 365,368-g (1979), 19 S.R.R. 1037, 1039 (Initial Decision, 1979; administratively final December 27, 1979); and *Behring International Inc.* (Initial Decision, March 17, 1981; administratively final June 30, 1981), 20 S.R.R. 1025, 1032-33.

Rule 91 of the Commission’s Rules of Practice and Procedure, 46 C.F.R. §502.91, codifies the *Old Ben Coal* holding in language borrowed in part from the APA, 5 U.S.C. § 554(c)(1). In accordance with Rule 91 and its policy favoring settlements, the Commission has approved

settlements of administrative and investigative proceedings. *Eastern Forwarding International, Inc.* (Initial Decision, July 30, 1980; administratively final September 8, 1980), 20 S.R.R. 283, 286 (“*Eastern*”); *Far Eastern Shipping Co.* (Initial Decision, March 25, 1982; administratively final, May 7, 1982), 21 S.R.R. 743, 764 (“*FESCO*”); *Armada Great Lakes/East Africa Service, Ltd.* (Initial Decision, March 21, 1986; administratively final April 25, 1986), 23 S.R.R. 946, 949 (“*Armada*”); *TWRA—Possible Violations of the Shipping Act of 1984* (Initial Decision, August 27, 1986; administratively final October 9, 1986), 23 S.R.R. 1329, 1340 (“*TWRA*”); and *Royal Caribbean Cruises Ltd. Possible Violations of Certification Requirements* (Order Approving Settlement and Discontinuing Proceeding, December 4, 1991), 26 S.R.R. 64 (“*Royal Caribbean*”).

The Commission’s regulations recognize the designated role of BOE in formal proceedings and, necessarily, in the settlement of those proceedings. 46 C.F.R. §§ 502.42 and 502.61. The regulations also require that the Presiding Judge approve all such settlement agreements in formal proceedings. 46 C.F.R. § 502.603(a).

### **Criteria for Approval of Settlement**

To discharge the duty imposed by 46 C.F.R. § 502.603(a), the Presiding Judge must decide whether the proposed settlement satisfies appropriate criteria for approval. Among the criteria to be considered in evaluating settlement offers are the Commission’s enforcement policy, litigative probabilities and litigative and administrative costs.

A summary of the Commission’s view of the relationship between the criteria for assessment of penalties and the criteria for approving settlements appears in the initial decision in *Armada*:

As seen, Section 13(c) of the 1984 Act and § 505.3 of the Commission's regulations, which implements both Section 13 of the 1984 Act and Section 32 of the 1916 Act, explicitly set forth criteria for assessment of penalties, and while they do not directly address the criteria for settlement of penalties, I believe the latter are subsumed by the former. This is manifest from the history of the settlement process at the Commission. Section 32(e) of the 1916 Act was enacted in 1977. [Footnote omitted.] The rules and regulations implementing Section 32(e) were promulgated and published by the Commission in a predecessor version of 46 CFR § 505, in 1979. Under those rules the "criteria for compromise, settlement or assessment" might "include but need not be limited to those which are set forth in 4 CFR Parts 101-105." . . . Those standards, particularly, the standards enumerated in 4 CFR § 103, were a part of the Commission's program for settlement and collection of civil penalties even before the authority to assess penalties was given the Commission pursuant to Section 32(e). More to the point, it was held that those standards provided criteria for both settlements and assessments. "They continue to provide valuable assistance to the Commission as an aid in determining the amount of penalty in assessment proceedings and in determining whether to approve proposed settlements in assessment proceedings." [citing *Eastern and Behring International, Inc., supra.*]

*Armada, supra*, 23 S.R.R. at 956. See also *Marcella Shipping Co. Ltd.* (Initial Decision, February 13, 1986; administratively final March 26, 1986), 23 S.R.R. 857, 866.

The appropriate standards for approving proposed settlements in assessment proceedings were summarized in *FESCO* as follows:

. . . settlement may be based upon a determination that the agency's "enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon"; that "the amount accepted in compromise . . . may reflect an appropriate discount for the administrative and litigative costs of collection having regard for the time it will take to effect collection"; the value of settling claims on the basis of pragmatic litigative probabilities, *i.e.*, the ability to prove a case for the full amount claimed either because of legal issues involved or a bona fide dispute as to facts; and that penalties may be settled "for one or for more than one of the reasons authorized in this part." [Footnotes omitted.]

*FESCO, supra*, 21 S.R.R. at 759.

The Commission has reaffirmed that potential costs and uncertainties of success are valid factors to be considered both in negotiation of settlement and in view of a settlement agreement. *Investigation of Unfiled Agreements-Yangming Marine Transport, et al.* (Order Adopting Initial Decision, March 30, 1988), 24 S.R.R. 910 (“*Yangming*”). See also *Royal Caribbean, supra*.

In line with the Commission’s analysis as enunciated in *FESCO, Eastern, Armada, Yangming*, and *Royal Caribbean, supra*, proposed settlements are to be evaluated on the basis of balancing agency enforcement policy of deterrence by Respondent, the industry and the general public with the litigative probabilities, litigative and administrative costs and such other matters as *justice* may require. That balance clearly favors approval of this proposed settlement.

With respect to the policy of enforcement, the importance of ensuring compliance by all regulated entities with the 1984 Act is paramount. Respondent supports the Commission’s objective and has in place systems and procedures designed to ensure compliance with the statutory provisions requiring adherence to tariff and service contract rates and charges.

There are bona fide disagreements between Respondent and BOE as to certain facts and legal issues pertaining to the past shipments which are the subject of this proceeding. While Respondent acknowledges making certain unintentional errors with respect to the tariff filing requirements applicable to the market rates charged for some shipments under its NVOCC tariff, its tariff has been corrected and steps have been taken to avoid a recurrence. At the same time, though, Respondent denies that it has engaged in any knowing and willful violations.


The outcome of any complex litigation such as this is uncertain. Inasmuch as this proceeding could be complicated, time consuming, and costly, the proposed settlement would save all parties time and expense. Therefore, the litigative probabilities and administrative costs of this proceeding favor approval of this proposed settlement agreement.

### Conclusion

The proposed settlement agreement meets the Commission's well-established criteria for approval of agreements settling administrative enforcement claims and, therefore, will be approved, and Docket No. 99-1 1 will be discontinued.

#### IT IS ORDERED:

The attached settlement agreement is approved and this investigation is discontinued.

  
Frederick M. Dolan, Jr.  
Administrative Law Judge

## Docket No. 99-1 1



WHEREAS, the Bureau of Enforcement and Respondent believe it is in the best interests of the parties and the shipping public to resolve the above-referenced proceedings rather than engage in costly litigation, the outcome and timing of which is uncertain;

NOW, THEREFORE, in consideration of the premises herein, it is hereby agreed as follows:

1. On or before October 8, 1999, Respondent shall make a monetary payment to an interest bearing escrow account, in the total amount of \$112,500 for the benefit of the Federal Maritime Commission. No later than October 12, 1999, Respondent shall provide written verification to the Commission that the total monetary payment of \$112,500 was placed in such interest bearing escrow account.
2. Upon approval by the Commission of the settlement, the \$112,500 shall be paid to the Commission within five business days, together with any interest which shall have accrued thereon through the date of payment.
3. Upon approval by the Commission and compliance with the terms set forth in this Agreement, this instrument shall forever bar the commencement or institution against Expeditors, its affiliates and subsidiaries, or any officers, directors and employees of Expeditors (including its affiliates and subsidiaries), of any civil penalty assessment proceeding or other claim for recovery of civil penalties, and any action for the suspension or revocation of Respondent's ocean transportation intermediary (OTI) license or for the suspension or cancellation of Respondent's published OTI tariff for the alleged violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984 and Commission regulations set forth in FMC Docket No. 99-1 1.
4. This Agreement is subject to approval by the Commission in accordance with 46 C.F.R. 501.603.

ON BEHALF OF RESPONDENTS EXPEDITORS INTERNATIONAL OF WASHINGTON, INC.

By: /s/ Richard D. Gluck

Title: Attomev

Date: October 5, 1999

ON BEHALF OF THE FEDERAL, MARITIME COMMISSION

By: /s/ Vem W. Hill

Vem W. Hill, Director

Bureau of Enforcement

Subject to Approval by the Commission in accordance with paragraph 4 hereof.

Date: October 5, 1999